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No. 90-1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHNNY DUPREE, *et al.*,

Appellants,

v.

MIKE MOORE, *et al.*,

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

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APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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I. Introduction

This appeal concerns the District Court's misapplication of the well-settled requirement that a jurisdiction subject to the Voting Rights Act submit its voting changes to the Attorney General for administrative preclearance in a clear and unambiguous manner. In *McCain v. Lybrand*, 465 U.S. 236 (1984), and more recently in *Clark v. Roemer*, 59 U.S.L.W. 4583 (U.S. June 3, 1991), the Court unanimously ruled that a state's failure to identify a voting change in its submission defeats any claim by the state that the Attorney General precleared the change. Here, the District Court held that the State of Mississippi properly submitted the voting change effected by the repeal of Miss. Code Ann. § 37-7-611 in July 1986 even

though, as the State conceded in 1989, the change "was not specifically identified" in the 1986 submission. App. 128a. The District Court's decision conflicts with *McCain* and *Clark* and, according to the Attorney General of the United States, will have a detrimental effect on administrative preclearance under § 5.

In urging affirmance or dismissal, Appellees' primary argument is that the effect of the District Court's decision will be insignificant and for that reason does not warrant further review by the Court. The basis for their argument is that two of the Attorney General's regulations governing § 5 submissions have been changed since the State's submission was made in July 1986. Appellees suggest any adverse effect of the decision on administrative preclearance will be minimal.

Appellees' main contention is severely undercut by the position of the Attorney General who participated as amicus curiae in the District Court. The Attorney General joined as amicus because of "the important issues raised by this case with regard to the enforcement of Section 5 . . . and the procedures that a jurisdiction covered by Section 5 must follow when submitting voting changes to the Attorney General for Section 5 administrative preclearance." Memorandum of the United States as Amicus Curiae, p.1. The Attorney General characterized Appellees' interpretation of the Voting Rights Act and the regulations governing § 5 submissions as "plainly incorrect." *Id.* at 2-3. He further noted that if Appellees' position prevailed it "would do substantial harm to the Section 5 administrative preclearance process" and impede "the ability of the Attorney General to carry out his responsibilities for administering the preclearance

process." *Id.* at 2, 19. In the light of the considerable deference accorded the Attorney General's views in § 5 matters,[1] Appellees' primary argument should be rejected.

II. The Regulatory Changes Since 1986 Do Not Limit the Effect of the Decision Below.

The first of the two regulatory changes upon which Appellees rely became effective in 1987 and requires that a state submit to the Attorney General a copy of the prior law being amended or repealed. 28 C.F.R. § 51.27(b) (1990). In 1986, this requirement did not exist. Appellees contend that supplying a copy of the prior law being amended or repealed "does much to clarify any alleged ambiguities surrounding submissions today." Joint Motion of State and Forrest County School District, p.11.

The second regulatory change concerns the Attorney General's authority to request additional information in response to an incomplete submission. In 1986, this requirement stated that the Attorney General "shall" request additional information in response to a deficient submission. Today, the Attorney General "may" request additional information. 28 C.F.R. § 51.37(a). Appellees fail to explain how the change from "shall" to "may" will ensure more clarity in a state's § 5 submission.

The Attorney General explained in his amicus memorandum filed in the District Court that these two regulatory changes do not alter the fundamental re-

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[1] *See, e.g., City of Pleasant Grove v. United States*, 479 U.S. 462, 468 (1987); *NAACP v. Hampton County Election Comm.*, 470 U.S. 166, 179 (1985).

quirement that a state identify with specificity the voting change for which it seeks preclearance. In 1986, the regulations required that a state supply a copy of the law embodying the voting change submitted for preclearance. *Id.* § 51.25(a) (1986). The regulations also required that if the voting change was not "readily apparent on the face of the document provided under" § 51.25(a), the submission should contain "a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting." *Id.* § 51.25(b). In short, the regulations required a state to identify the voting change presented for review.

Today, "a clear statement of the change" need not be made "if the change is readily apparent from examining the new enactment and the enactment that was repealed, amended, or otherwise changed." United States Amicus Memorandum, p.15 n.5. In 1986, "the procedures specified more narrowly that the change needed to be readily apparent solely from examining the enactment embodying the change in order to omit providing 'a clear statement of the change.' " *Id.* The regulation requiring a copy of the prior law being amended or repealed provides a state "greater latitude" in preparing its submission, *id.*, but does not diminish the state's responsibility to identify clearly each voting change presented for preclearance. The new regulation is merely a recognition that in some cases, but not all, the voting change will be apparent from a comparison of the new law and the prior law.

The position advanced by Appellees and adopted by the District Court undermines the effectiveness of the § 5 regulatory scheme by shifting to the Attorney General the obligation to research a state's submission to uncover voting changes the state either is unaware of or fails to identify. Pointing to the thousands of voting changes reviewed annually by the Attorney General, the Court in *Clark v. Roemer* rejected this interpretation of § 5:

> "[B]ecause of the acknowledged and anticipated inability of the Justice Department—given limited resources—to investigate independently all changes with respect to voting enacted by States and subdivisions covered by the Act," Congress required each jurisdiction subject to § 5, as a condition to implementation of a voting change subject to the Act, to identify, submit, and receive approval for all such changes. The District Court's holding upsets this ordering of responsibilities under § 5, for it would add to the Attorney General's already redoubtable obligations the additional duty to research each submission to ensure that all earlier unsubmitted changes have been brought to light.

59 U.S.L.W. at 4586 (citation omitted).

III. The 1986 Submission Did Not Specifically Identify the Voting Change Effected by the Repeal of Section 37-7-611.

Appellees' other arguments concern the validity of the 1986 submission.

1. Appellees contend the use of the phrases "the complete act is submitted for review" and "in its entirety" in a submission is a proper substitute for identifying the voting changes it wishes precleared by the Attorney General. This view of the preclearance process cannot be squared with *McCain* and *Clark*. *McCain* held that preclearance by the Attorney General "is limited to the changes which a covered jurisdiction has identified by its submission." 465 U.S. 251 n.20. *Clark* held that a state "must identify with specificity each change that it wishes the Attorney General to consider." 59 U.S.L.W. at 4586.

2. During the five-year submission history of the Uniform School Law, the State made a number of representations that the voting change effected by the repeal of § 37-7-611 had not been specifically identified in the July 1986 submission. *See, e.g.*, App. 115a, 117a-118a, 128a, 145a. Nevertheless, Appellees argue that "[n]ot only was the scope of the [1986] submission unambiguous, but the State clearly identified any voting changes involved in this appeal." Joint Motion, p.16. The basis for this contention is that § 37-7-611 was "addressed in the loose-leaf notebook." *Id.* Section 47 of the Uniform School Law repealed twenty-three statutes, including § 37-7-611, and listed them in a string citation, followed by the comment that these statutes "provide for the creation and operation of municipal separate school districts [and] are hereby repealed." App. 75a.

Rather than acknowledge the State's failure to satisfy its obligation to identify this voting change, Appellees blame the ambiguity on the Attorney General's "disregard of information clearly set forth in the submission." Joint Motion, p.16. The underlying premise of Appellees' position, as well as the District Court's decision, is that a state's submission will be considered complete and unambiguous simply if it requests that an act be reviewed "in its entirety," regardless whether the voting changes created by the act are specifically identified or explained. To accept this position would encourage ambiguous submissions by jurisdictions that would later attempt to take advantage of the ambiguity by claiming unidentified voting changes were precleared.

In recognition of the inconsistency in their position, Appellees ask the Court to disregard the State's remarks as irrelevant. The State's representations to the Attorney General that the repeal of § 37-7-611 was not submitted in July 1986 plainly show the State believed the repealer had not been submitted.

3. Appellees' reliance on *Morris v. Gressette*, 432 U.S. 491 (1977), is misplaced because the issue presented in this appeal—whether a voting change was actually submitted to, and evaluated by, the Attorney General—was not present in *Morris*. The submission in *Morris* was unambiguous. *Id.* at 502, 504 & n.19.

Appellees also rely on *Woods v. Hamilton*, 473 F. Supp. 641 (D.S.C. 1979), in which the court held that a submission by South Carolina of its Home Rule Act constituted submission of the entire Act. Whether *Woods* was correctly decided in 1979 is of no moment because later Supreme Court precedent establishes that a § 5 submission of legislation to the Attorney

General with a general request for preclearance is appropriate *only* if the voting changes effected by the legislation are "clearly defined." *Clark*, 59 U.S.L.W. at 4585-86; *McCain*, 465 U.S. at 256. If *Woods* stands for a state's right to submit omnibus legislation in general terms for preclearance and by doing so obligate the Attorney General to uncover and then review voting changes that were not initially explained or identified by the state, the decision should be overruled.

4. Appellees point to language in the 1987 submission of the repealer of § 37-7-611 (App. 114a) that purports to preserve the State's right to argue that the repealer had already been submitted and precleared. Joint Motion, p.8. Identical language appeared in the July 1986 submission (App. 34a) and in the State's submission of §§ 60 and 84 of the Uniform School Law in May 1987. This language is an attempt to preserve an argument that the legislation submitted does not affect voting. It is difficult to believe the State, in submitting § 47 of the Uniform School Law in December 1987, chose not to articulate its position that the repealer had already been submitted and precleared or at least inquire of the Attorney General regarding the precise status of the repealer.

5. Appellees' contention (Joint Motion, p.4-5) that the amendment to § 37-7-103, as set forth in § 52 of the Uniform School Law, "replaced all conflicting provisions regarding the movement of school district lines," including § 37-7-611, was not made in July 1986. If successful, Appellees' attempt to capitalize on the ambiguity in its July 1986 submission by now claiming preclearance of unidentified voting changes

will only encourage ambiguous submissions and undermine the process of administrative preclearance.

6. Relying on *Greenville Public School Dist. v. Western Line Consol. School Dist.*, 575 So.2d 956 (Miss. 1990), *petition for cert. filed*, 59 U.S.L.W. 3839 (U.S. June 3, 1991) (No. 90-1861), in which the court held that § 37-7-611 was repealed by implication because of the amendment to § 37-7-103, Appellee Lamar County School District argues the state court decision provides an independent and adequate state ground upon which to affirm the District Court. Lamar County's position essentially advocates the doctrine of "preclearance by implication," reasoning that preclearance may be effectuated by application of state rules of statutory construction and thereby avoid administrative or judicial preclearance. Under this novel theory, Mississippi would apparently be required to obtain preclearance when its voting laws are expressly repealed by the state legislature but not when they are held repealed by implication by a state court. This argument is a request for the Court to place beyond the reach of the Voting Rights Act any voting change implemented because of a state court order. The Court rejected this precise argument in *Hathorn v. Lovron*, 457 U.S. 255, 265 n.16 (1982): "[A] state court decree directing compliance with a state election statute contemplates administrat[ration] of the state statute within the meaning of § 5."

Appellants urge that probable jurisdiction be noted.

Respectfully submitted,

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